

Phung (Migration) [2023] AATA 1161 (26 April 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Sang Thanh Phung
Mr Huu Trong Phung
Ms Gia Nghi Phung

REPRESENTATIVE: Mr Garry Frederick Howard (MARN: 9804095)

CASE NUMBER: 1837254

HOME AFFAIRS REFERENCE(S): BCC2018/596625

MEMBER: David Crawshay

DATE: 26 April 2023

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decisions not to grant the applicants Partner (Temporary) (Class UK) visas.

Statement made on 26 April 2023 at 12:58pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – applicant had been transferring money to a third party whom the sponsor may not have known – lack of evidence of recognition from all but a small group of third parties – not satisfied that the evidence points to them being in a genuine and continuing relationship – not satisfied that the parties have had a mutual commitment to a shared life together as a married couple to the exclusion of all others – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (hereafter referred to as the applicant) applied for the visa on 5 December 2018 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant met the definition of spouse or de facto partner under s.5F or s.5CB of the Act. A copy of the delegate's decision was provided to the Tribunal by the applicant.
4. The applicants appeared before the Tribunal on 21 February 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, as well as two witnesses – Mr Hoang Vo and Mr Nhien Trong Nguyen. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The applicants were represented in relation to the review. The representative attended the Tribunal hearing.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant was the spouse of the sponsor at the time of application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
8. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in

the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has seen a copy of a certificate for a marriage that took place on 19 November 2017 in Abbotsford. The certificate stated that the marriage was solemnised in accordance with the *Marriage Act*. It is satisfied that the certificate is genuine and that the parties were free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

10. Based on the information in front of it, the Tribunal finds that the parties do not have any joint ownership of real estate or other major assets. The applicant submitted two receipts for purchases at Harvey Norman and one at JB Hi-Fi. While the receipts for the purchases from Harvey Norman list both parties, these are cash sales and it is unclear based on the receipts alone if they were joint purchases. The purchase from JB Hi-Fi was an eftpos sale, although the Tribunal has been unable to ascertain whether it was made on behalf of both parties (through their joint bank account). This evidence is given very little weight by the Tribunal.
11. There is no evidence that the parties have any joint liabilities. No weight is accorded to this aspect.
12. Turning to the extent of any pooling of financial resources, especially in relation to major financial commitments, the information shows that the parties have a joint bank account. Statements provided from a joint transaction account for the period from January 2018 to December 2022 show deposits into this account from the applicant's employer, as well as cash withdrawals, payments for utilities, some eftpos transactions from stores such as supermarkets and petrol stations and numerous transfers to-and-from various people.
13. The Tribunal discussed with the applicant certain transfers made to two individuals – Thi Kim Vu and Quan Anh Vu. It asked him who Thi Kim Vu was and he replied that while he was working, she was a member of his group. He said that the sponsor also knew her. It asked him who Quan Anh Vu was, and he said that this person worked with him. It asked him about his relationship with these two people, and he reiterated that Quan was a work colleague and that Kim was a friend in his group. It asked him if he has any business relationship with these people outside of work, and he replied that they sometimes meet on the weekends or at parties.
14. The Tribunal specifically discussed a few transfers and payments that were made to these people – some examples being transfers to Kim and Quan from 13 October and 15 October 2021 – as well as a large payment made to the applicant from Quan on 18 December 2021. He said to Quan lent him money to buy a car. It asked about the transfers to Kim, and he replied that she was part of a savings club of 10 to 20 members. He said that they put in sums of money such as \$300, \$450 and \$500 and then withdraw money when needed.
15. Later in its questioning of the sponsor, the Tribunal asked her how she knew Kim. She said that Kim was a friend of her and the applicant. She said that she met her at another friend's house. When asked, she said that the applicant met her through shopping. When asked, the

applicant said that Kim did not work with the applicant but then said that Kim works in a restaurant and that perhaps the applicant knew her through that too.

16. The Tribunal asked the applicant what they had typically been paying for rent, and he replied that it was between \$400 and \$500-a-month. It asked him about the sponsor's income and he replied that she stopped receiving Centrelink after he began working full-time. It asked about other expenses, and he replied that he gives the sponsor between \$300 and 400-a-week to do shopping. The sponsor spoke to the same details regarding the weekly payment to her.
17. At this point, the Tribunal laid out the following concern. It pointed to information showing that the applicant received a decent salary (with documents on the Tribunal file showing weekly payments of between \$1,600 and \$1,800 and sometimes \$2,000-a-week) and asked him where the money was going. He replied that it was mostly spent on his children and their schooling, the savings group and the joint savings account. It asked him how much was in this savings account, and he replied that it was around \$4,000. When asked about the amount of savings held by the applicant, the sponsor replied that she did not know. She told the Tribunal that she cannot speak English or read Vietnamese, so she relies on the applicant and leaves him to do this.
18. The Tribunal also laid out its concern to the applicant about a perceived inconsistency in the answers given by him and the sponsor in relation to how the applicant knew Kim – namely, that the applicant said that she was working with him whereas the sponsor said that they met through shopping and did not mention about the applicant knowing Kim through work. It told him that this was significant because the applicant had been transferring money to Kim when it seems that the sponsor did not know who Kim was.
19. The applicant replied that when the applicant attended the Tribunal, she worried a lot, her spirit was not normal and she forgot things. He said that they sometimes worked as dishwashers at a restaurant on the weekend. The Tribunal remarked that this was a new claim, before pointing out a concern with the applicant's answer – being that he appeared to say that the sponsor forgot how the applicant and Kim knew each other but then asserted that they knew each other through working in the restaurant. The applicant replied that the sponsor got a job as a dishwasher a very long time ago but did not do it very often, so she knew Kim as a dishwasher working at the restaurant. He said that the reason the sponsor worked there was that she sometimes complained about getting bored and he told her to get a job as dishwasher.
20. The Tribunal harbours major doubts about the applicant's explanation for the perceived inconsistency between him and the sponsor about how he knows Kim. Specifically, it finds the applicant's explanation to lack credibility. On the one hand, he attempted to explain this perceived inconsistency by reference to the sponsor's mental state when giving evidence at hearing. However, and on the other hand, he then asserted that he did in fact work alongside Kim in a restaurant – suggesting that the sponsor was right in the answer that she gave. As it put to him at hearing, it appeared that he was trying to "have it both ways" in his explanation.
21. The significance of this is clear in the eyes of the Tribunal. The applicant had been making several sizeable transfers to Kim, such as these transfers totalling \$3,500 which were contained in a six-month bank statement from 2021 by way of example:
 22. -\$500 on 7 February 2021;
 - \$100 on 14 February 2021;
 - \$500 on 13 March 2021;
 - \$200 on 1 April 2021;
 - \$500 on 9 April 2021;

-\$300 on 15 April 2021;
-\$600 on 16 April 2021;
-\$500 on 18 May 2021; and
-\$300 on 1 June 2021.¹

23. However, it appeared that the sponsor may have been unaware of who Kim was based on answers to the Tribunal's questions and specifically based on the inconsistency in the parties' evidence about Kim. Moreover, the fact of these transfers to Kim taking place is in itself significant given that the applicant has only been able to save a modest amount of money (\$4,000 by his own evidence) despite earning what the Tribunal considers to be a decent salary. That he would be transferring money to someone whom the sponsor appeared not to know instead of putting this money away in savings reflects adversely on him and on the parties' relationship. As a result, the Tribunal accords adverse weight to this evidence.
24. Lastly, there is no information to show that the parties owe any legal obligations in respect of the other. No weight is given either way to this evidence.
25. The Tribunal has considered the information in front of it including the above information. While it accepts and gives some weight to information showing that the applicant has been contributing to the sponsor by giving her money to spend and by paying the rent, it finds that this information is outweighed by other information that suggests that the parties have not integrated their finances and that the applicant had been transferring money to a third party whom the sponsor may not have known. It is not satisfied that the financial aspects of the parties' relationship point to them being in a genuine and continuing relationship at the time of application or at the time of this decision.

Nature of the household

26. The Tribunal has firstly considered whether the parties have any joint responsibility for the care and support of children. In this regard, it notes that the sponsor has four adult-aged children and the applicant has two adult-aged children – being the secondary applicants). However, there is very little information showing that the parties have shared in the care and support of each other's children. At hearing, one of the secondary applicants (Ms Gia Nghi Phung) told it that the sponsor loves her like a biological child. The other secondary applicant (Mr Huu Trong Phung) told it that the sponsor looks after them very well with sincerity and that she makes them feel happy like his biological mother. While noting these claims, the Tribunal gives them little weight in the absence of substantiating information.
27. Turning to the parties' living arrangements, the Tribunal acknowledges the presence on the files and especially the Tribunal file of various pieces of correspondence addressed to one or both parties or to a secondary applicant (in this case, mostly Ms Gia Nghi Phung). While it notes that such evidence may be generated with little or no verification process, it accepts that the parties have been living under the same roof since they claim to have moved in together in 2017.
28. At hearing, the Tribunal put to the applicant that there was not much evidence to show that the parties shared the responsibilities of the household. The applicant responded that as he works for more-than-70 hours-a-week, he is very tired. He said that, on the weekend he helps the sponsor with handyman tasks. He said that he has another job fixing up old cars. The Tribunal asked the applicant whether, in these circumstances and having made these life choices, he has time to devote to the sponsor. The applicant repeated that he worked over 70 hours-a-week and helped out on the weekend with odd jobs. He said that he had no

¹Tribunal Document ID number 10739441.

free time. The Tribunal asked the sponsor whether she and the applicant have time to devote to each other given the applicant's work during the week, she replied that the parties talk every day after work over dinner.

29. The Tribunal must be careful in making findings about the parties' living arrangements given that relationships differ between couples. It is not unreasonable for couples (or one of them) to work long hours in order to support each other and their relationship. This is especially the case where one party to the relationship is not able to derive an income, and the other party is therefore called upon to be the sole earner. This may result in a couple only being able to see each other at irregular hours. Nothing adverse should be drawn from this or from the applicant attending to odd jobs around the house on the weekend.
30. However, the Tribunal finds it concerning, in circumstances where the applicant claims to be working very long hours during the week and doing handyman tasks on the weekend, that he would use the little free time he has to be indulging a second job fixing up old cars rather than with the sponsor. It does not consider such behaviour, and the parties' living arrangements overall, to be characteristic of a genuine relationship or suggestive of a commitment by the applicant to the sponsor.
31. Therefore, while the Tribunal accepts that the parties have been living under the same roof at the time of application and at the time of this decision and have been performing household tasks at these times, the available evidence does not indicate that they have been doing so as members of a genuine and continuing relationship where there is a mutual commitment to a shared life as a married couple to the exclusion of all others.

Social aspects of the relationship

32. The Tribunal has considered the presence of several photographs of the parties in various situations, although no information was provided about when, where and in whose presence these photographs were taken. Having said this, it accepts that some were taken in Vietnam, while others were taken at a 70th birthday party. In a submissions letter dated 14 February 2023, the applicant's representative stated that the photographs show that parties had visited the applicant's family during a trip to Vietnam in 2018. Without the benefit of knowing the specific details of the photographs, the Tribunal is unable to verify this claim. One photograph appears to have been taken at a gathering for the applicant's birthday, although the year is not known.
33. At hearing, the Tribunal heard from the applicant that he takes the sponsor to church when he has free time or to the temple (where she waits outside). He said that the parties visit friends, go shopping or drink coffee.
34. The Tribunal asked the applicant whether he had any comment on the delegate's finding in relation to the parties' wedding. In this regard, the delegate stated in her decision that she was not satisfied that the parties had publicly presented themselves as a married couple to the wider community, and this finding was based on there being little evidence of the parties having taken part in a reception as claimed by them. The applicant responded that, since he and the sponsor had been married before, they did not want to have a big ceremony and wanted instead to organise it "in the family". While the Tribunal accepts that parties to a second marriage might want to have low-key celebrations, it notes that the delegate's finding also related to a specific evidentiary issue – being that little evidence was provided to substantiate the claims made about a wedding reception taking place and the evidence that was provided (in this case, a receipt) not being conclusive of the parties having held such a reception. As such, it does not accept that the applicant has sufficiently explained why there is no probative evidence of the reception having taken place and is not satisfied that the reception took place.

35. The Tribunal has considered the information in front of it in relation to the opinion of the parties' friends and acquaintances about the nature of their relationship. It acknowledges the presence of some information that purports to show the opinions of third parties, being three statutory declarations in February 2023 that are in addition to the two Form 888 statutory declarations provided in December 2017 at the Department stage.
36. However, so far as the declarations from February 2023 are concerned, the information given is, with respect, generic in nature. Moreover, while the authors of these declarations have asserted their friendship with the parties, they have not elaborated on how they know them or for how long, making it difficult to be able to assess the quality of the information given. It is given very little weight as a result.
37. In terms of the earlier Form 888 declarations from December 2017, the authors of the declarations have stated how they know the parties – in the first declaration by Ngoc Qui Lam, this was through knowing the sponsor for 10 years; in the second declaration by Hoang Yen Pham, this was through being the sponsor's child. The content of the declarations is more detailed, and the authors given plausible reasons for their belief in the parties' relationship being genuine and continuing. This evidence is given weight.
38. At hearing, the Tribunal heard the oral testimony of two third-party witnesses, Mr Hoang Vo and Mr Nhien Trong Nguyen who told it of their belief in the genuineness of the parties' relationship based on seeing the parties and, in the case of Mr Nguyen, sharing accommodation with them. Some weight is accorded to this evidence.
39. Having considered the information in front of it, the Tribunal finds that there is very little if any evidence that the parties have represented their relationship beyond a small group of people.
40. The Tribunal has considered that the sponsor stopped receiving Centrelink payments. The applicant told it that this occurred when he began working full-time. The Tribunal infers from this set of events that the parties' relationship was disclosed to Centrelink. It accords some weight to this information as suggesting that the parties have divulged their relationship to a major government agency.
41. The Tribunal acknowledges that the photographs submitted show the parties during a trip to Vietnam in 2018. Other photographs show the parties in some social situations. As above, the Tribunal has been unable to ascertain when these were taken. That being said, it accepts that the parties have planned and undertaken some joint social activities and gives this aspect some weight.
42. The Tribunal has considered the evidence of the social aspects of the parties' relationship. However, given the lack of evidence of recognition from all but a small group of third parties and very little evidence of them representing themselves to others, it is not satisfied that the evidence points to them being in a genuine and continuing relationship.

Nature of the parties' commitment to each other

43. The Tribunal deals firstly with the duration of the relationship, which necessitates a consideration of how the parties claim to have met. In this regard, the parties claim to have met each other at the death anniversary of the mother of a mutual friend. This friend was identified by the applicant as being Mr Tho and by the sponsor as "Mr Five" despite repeated attempts for her to state his full name. The applicant said that he knew Mr Tho from Vietnam where he used to bring cars for the applicant to fix. He said that the sponsor knew Mr Tho for a long time but did not explain how they knew each other. The sponsor told the Tribunal that

she became friends with “Mr Five” in the last 10 years. She said that he attended her wedding with his children.

44. The Tribunal raised a concern with the applicant that the sponsor did not know the identity of the person through whom the parties claim to have met. He replied that people in Vietnam often get a nickname and that the parties know him as “Mr Five”. He said that his name on his birth certificate is Mr Tho but in her distress the sponsor called him “Mr Five”.
45. The Tribunal accepts that people have nicknames by which they may also be known. However, given the longstanding relationship that the sponsor claims to have enjoyed with “Mr Five” and the role that he allegedly played in the parties meeting each other, it would have expected her to have known his proper name, or even one element of it such as his given or family name, or perhaps a reason that he was called “Mr Five” based on his proper name (if any such reason existed). For this reason, it gives the applicant’s explanation very little weight. Given that there is no other evidence from around this time to substantiate the claims about the parties having met, the Tribunal is not satisfied that the parties met in the way claimed by them in July 2017 or that their relationship developed thereafter in the manner described by them in their declarations dated 19 December 2017. The best that may be said is that they met later on in 2017 where there is documentary evidence to show that they knew each other.
46. Having made the above findings, the Tribunal finds that the parties had only known each other for a very short amount of time when they were married in November 2017.
47. As to the length of time during which the person have lived together, the Tribunal relies on its finding above in the “nature of the household” that the parties had been living under the same roof since they were married.
48. The Tribunal turns next to the degree of companionship and emotional support that the parties draw from each other. When asked at hearing about what commitment meant to him, the applicant told the Tribunal that the parties had been together for five years and still lived in rental housing. He said that the parties wanted to save enough money to buy a small house and live happily forever. He said that they wanted their marriage to be recognised by other people. He said that the parties have loved each other very much and were committed to love and live together until the last minute of their lives.
49. This is the only piece of information from the parties themselves that directly speaks to their level of commitment. It is for the most part prosaic, which may be understandable as the issues to which the applicant refers – such as being able to afford a house – are issues that are faced by partners in many relationships. However, the Tribunal is struck by a general lack of information that would substantiate or further illustrate the commitment of the parties to their relationship and specifically the level of companionship and emotional support that they draw from each other. This is telling for a relationship which the parties claim has been on-foot for a considerable time, but it is particularly significant as one of the bases upon which the delegate refused the visa was that the parties had not provided sufficient evidence to demonstrate the nature of commitment of their relationship. For this reason, the Tribunal gives very little weight to this evidence and to the parties’ evidence more broadly about the level of companionship and emotional support that they draw from each other.
50. Lastly, no specific information was provided by the parties about whether they view their relationship as a long-term one. This aspect is given very little weight as well.
51. The Tribunal has considered evidence of the nature of the parties’ commitment to each other and weighed it against itself. Having done so, it finds that the evidence is not indicative of the parties’ relationship being genuine and continuing or of them having a mutual commitment to

a shared life as a married couple to the exclusion of all others, either at the time of application or at the time of this decision.

CONCLUSION

52. The task of assessing whether the applicant has been the spouse of the sponsor at the relevant times involves weighing the evidence in front of the Tribunal before balancing that evidence against itself. While there is some evidence that the parties have been living under the same roof at various addresses, this must be weighed against other evidence, such as a lack of evidence of the parties representing themselves beyond a small group of people and very little evidence of them drawing companionship and emotional support from each other. Having taken into account the matters set out in r.1.15(3) in relation to the definition of spouse under s.5F(2), and based on the above evidence and findings, the Tribunal is not satisfied that at the time of the visa application and at the time of this decision the parties have had a mutual commitment to a shared life together as a married couple to the exclusion of all others or that their relationship has been genuine and continuing.
53. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2)(b) and s.5F(2)(c) are met at the time the visa application was made or at the time of this decision.
54. Therefore, the applicant does not meet cl.820.211(2)(a) or cl.820.221.
55. Because the applicant is not the holder of a Subclass 820 visa, the secondary applicants are unable to satisfy the requirements of cl.820.321. No claims have been made by them against the primary criteria.
56. For the reasons above, the applicants do not satisfy the criteria for the grant of the visa.

DECISION

57. The Tribunal affirms the decisions not to grant the applicants Partner (Temporary) (Class UK) visas.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).